upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand, this particular branch of law.

Secondly, even though the contract is one which *prima facie* falls under one of the recognized heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine, as Lord Atkin remarked in a leading case(4), 'should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.... In popular language... the contract should be given the benefit of the doubt."

Counsel for the appellant also referred us to section 24 of the Contracts Act 1950 which provides as follows:

"The consideration or object of an agreement is lawful, unless —

(a) it is forbidden by a law;
(b) it is of such a nature that, if permitted, it would defeat any law;
(c) it is fraudulent;
(d) it involves or implies injury to the person or property of another; or
(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

It is to be observed that section 24 deals with such consideration and objects of a contract as are unlawful and therefore illegal. This section is *in pari materia* with section 23 of the Indian Contract Act. Pollock and Mulla on the Indian Contract Act (8th Edition) in its commentary on section 23 under the heading "Opposed to Public Policy" says this:

"The general head of public policy covers, in English law, a wide range of topics. Agreements may offend against public policy by tending to the prejudice of the State in time of war (trading with enemies, etc.), by tending to the perversion or abuse of municipal justice (stifling prosecutions, champerty and maintenance) or, in private life, by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage, or their liberty to exercise any lawful trade or calling.... It is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. No court can invent a new head of public policy."

The arguments put forward by counsel for the respondent in contesting the appeal may be summarised as follows. The defendant did not plead that the contract was void as being opposed to public policy. For the court to take cognizance of illegality the transaction must be illegal on the face of it. Not being registered as a remisier is not contrary to public policy because the bye-laws of the Stock Exchange are the bye-laws of a private body which have no force of law. They are binding on the plaintiffs but not on the defendant. If the plaintiffs were dealing with an unregistered remisier they were committing a breach of bye-law 97 of the Stock Exchange Rules which provides for a penalty. But their dealing with such a remisier did not make the contract illegal as being opposed to public policy.

I do not think there is any merit in the argument that illegality was not pleaded because a court is bound to take cognizance of it if it is of the opinion that the contract is void on the ground of being contrary to public policy. But I entirely agree with the rest of the arguments put forward by counsel for the respondent. It seems clear that the present contract does not fit into any of the traditional pigeon holes. It was on the basis of those arguments that the learned trial judge found that the contract between the plaintiffs and the defendant was not illegal. In my judgment the learned judge was quite right in taking that view.

I would dismiss this appeal with costs.

Ali and **Ong Hock Sim F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Lim Ewe Hock; Maxwell, Kenion, Cowdy & Jones.*

PUBLIC PROSECUTOR v. LOO CHOON FATT

[R.Cr.J. (Hashim Yeop A. Sani J.) January 29, 1976]
[Ipoh — Perak Criminal Revision No. 6 of 1976]

Criminal Law and Procedure — Sentence — Offence of possession of dangerous drugs — Factors to be taken into consideration in assessing sentence — Public interest — Whether provision for binding over under s. 294 Criminal Procedure Code applicable — Criminal Procedure Code (F.M.S. Cap. 6), ss. 173A and 294.

Dangerous Drugs — Possession — Sentence.

In this case the respondent had pleaded guilty to a charge of possession of dangerous drugs. In mitigation he stated that this was his first offence and that he was threatened that if did not sell the drugs he would be assaulted. He was bound over under section 294 of the Criminal Procedure Code. The case came before the High Court in revision.

Held: (1) the discretion to order a bond under section 294 of the Criminal Procedure Code cannot be applied to an offence under section 12(2) of the Dangerous Drugs Ordinance, 1952 because there is an alternative punishment of either a fine or imprisonment provided in that section;

(2) in the circumstances of this case a sentence of six months' imprisonment would be appropriate.

[Editorial Note: See decision of Abdoolcader J. at p. 267 post.]

Cases referred to:-

(1) *Heng Kim Khoon* v. *Public Prosecutor* [1972] 1 M.L.J. 30.
(2) *Rex* v. *Kenneth John Ball* 35 Cr.App.R. 164.
(3) *Rex* v. *Grondkowski* [1946] 1 All E.R. 560, 561.
(4) *Public Prosecutor* v. *Idris* [1955] M.L.J. 234, 235.
(5) *Re Eng Chong Lam* [1964] M.L.J. 10.
(6) *Public Prosecutor* v. *Tan Eng Hock* [1970] 2 M.L.J. 15.
(7) *Re Badri bin Abas* [1971] 1 M.L.J. 202, 203.

CRIMINAL REVISION.

Wan Abdul Majid bin Wan Hamid (Deputy Public Prosecutor) for the applicant.

Paramjit Singh for the respondent.

Hashim Yeop A. Sani J. (delivering oral judgment): The facts of the case are that on May 20, 1975 at about 11.20 a.m. a Police constable, P.C. 58206, arrested the accused in Kampong Jawa, Ipoh, and from his person were recovered 13 plastic tubes containing 3 grammes of what was suspected to be heroin. The accused was released on bail the following day. The chemist's report tendered in the Sessions Court, Ipoh, on November 25, 1975 showed only 1.2 grammes of heroin contained in 13 plastic tubes. The Special President amended the original charge as to the amount of heroin although this is not reflected in the certified

copy before the Court. The accused pleaded guilty to the offence. In his mitigation the accused stated that this was his first offence and that he was threatened that if he did not sell the drugs he would be assaulted. The accused was bound over under section 294 of the Criminal Procedure Code for one year in the sum of $750 with one surety. The accused's mother stood on surety.

The only point raised by Mr. Paramjit Singh worth considering is whether the Special President should have rejected the plea of guilty because the accused stated "that he would be assaulted" if he did not sell the drugs. *Heng Kim Khoon* v. *Public Prosecutor*[1] was cited as an example where the judge in exercising his revisionary powers ordered a retrial because the accused had pleaded guilty under an erroneous view of the law. But it should be noted that that case and the other English cases cited therein concerned a plea in mitigation which affected an essential ingredient of the offence and that the explanation of the accused discloses no offence in law. This is not the case here. I have also examined the records and there is nothing therein to indicate any irregularity. What is left therefore is the question of sentence.

In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.

The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

In respect of offences under the Dangerous Drugs Ordinance, 1952, there has been a gradual change in the attitude of the legislature during the last few years. The Ordinance has been amended by Parliament a number of times, in 1971 (by Act A112 of 1972) then in 1973 (by Act A194 of 1973) and then in 1975 (by Act A293 of 1975). At the moment there is yet another amendment which is awaiting the Royal Assent. In the legislative exercise in 1973 penalties attached to the various offences under the law were enhanced. For the offence of possession of any dangerous drugs under section 12(2) of the Ordinance, for example, the penalty was increased from a maximum of $10,000 fine to a maximum of $20,000 fine and the maximum imprisonment was increased from three years to five years. In the legislative exercise in 1975, among other things, a new provision (new section 39A) was inserted whereby it is provided that whoever is convicted of an offence under the Ordinance and the subject matter of which is heroin or morphine of five grammes or more in weight shall be liable to imprisonment (with no option of a fine) for a term not exceeding fourteen years and not less than three years and he shall also be liable to whipping of not less than six strokes. According to the Bill which is at the moment awaiting the Royal Assent another new provision is inserted creating a new offence of planting or cultivating any plant from which raw opium, coca leaves, poppy-straw or cannabis may be obtained. The punishment for the new offence is life imprisonment and whipping.

It is common sense to say that behind these legislative exercises was the government's realisation *albeit* gradual, of the problem of drug abuse in this country, the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself. The amendments passed by Parliament therefore reflect the public policy. It must be presumed that behind the public policy is the consideration of public interest.

The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. This is not saying that the courts in the treatment of drug offences should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.

One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J. in *Rex* v. *Kenneth John Ball*[2] as follows: —

> "In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe."

Presidents and Magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by

a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused. Lord Goddard L.C.J. in *Rex* v. *Grondkowski*[3] offered some good advice when he said: —

"The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners."

Coming back to the instant case, the court below thought it fit that the accused be bound over under section 294 of the Criminal Procedure Code. It would seem to me quite clear that on the terms of section 294 of the Criminal Procedure Code the discretion to order a bond under that section cannot be applied to an offence under section 12(2) of the Dangerous Drugs Ordinance, 1952 because there is an alternative punishment of either a fine or imprisonment provided in that section. The two primary prerequisites which must be satisfied first before the court can proceed to consider whether to exercise its discretion to order a bond under section 294 of the Criminal Procedure Code are that (1) the accused is not a youthful offender and (2) he has been convicted of an offence punishable with imprisonment. The distinction between section 294 and section 173A of the Criminal Procedure Code was made a long time ago in *Public Prosecutor* v. *Idris*[4] by Thomson J. (as he then was) and which was reiterated in the judgment of Gill J. (as he then was) in *Re Eng Chong Lam*.[5] The question now is should the order of binding over of the accused here be substituted by a similar order under section 173A of the Criminal Procedure Code because he is a first offender or a youthful offender or that he said he was "forced" to commit the offence? Having regard to the nature of the offence, the circumstances of the case and the mitigation of the accused and the probation report I think not.

The types of cases and the set of circumstances where section 173A of the Criminal Procedure Code can appropriately be applied are by no means exhaustive. In addition to what has been said in *Public Prosecutor* v. *Tan Eng Hock*[6] and in *Re Badri bin Abas*[7] as to when it would be appropriate to exercise the discretion under that section I would say that in respect of offences for possession of drugs in relatively small quantities the court ought also to consider —

(1) whether the court is of the opinion that the accused is an addict and in need of rehabilitation since the object of punishment is twofold, *i.e.* to prevent others from following the example and at the same time to reform the accused;

(2) whether any person (in the case of an accused who is a young offender whether any of his parents or guardian) has come forward to the court willing and able to undertake to rehabilitate him; and

(3) whether the commission of such offence is not rampant and that a deterrent punishment is not really called for.

Needless to say, the court should not simply jump at exercising the powers under section 173A of the Criminal Procedure Code simply because the accused is a youthful offender and he says he regrets what he has done. It would be useful, I think, if I repeat here what was said by the late Sharma J. in *Re Badri bin Abas* (with which I wholeheartedly agree) as a word of caution on the exercise of discretion under section 173A of the Criminal Procedure Code in that an exercise of discretion under this section requires a considerable sense of responsibility and courts should not allow themselves to be misled into applying this section by any misplaced sense of leniency or sympathy. That section is not meant to be applied indiscriminately to all first offenders who say they regret what they have done and ask for leniency.

In the present case according to the probation report the accused is an only son who will be 21 years old in less than 2 months time. His mother had been separated from his father. The accused and his mother have been living in a slum area infested with "gangsters" and "drug addicts." At the time the probation report was written the accused was a painter earning $6 a day and the mother was a maidservant earning about $60 per month.

Having regard to the background report on the accused and his plea in mitigation that he was in fact peddling drugs although he said he was forced to do so, I consider that the order to bind him over with his mother as the surety is clearly and manifestly inadequate not only considering the nature of the offence and the circumstances under which it was committed but also considering that such bond is ineffective under the circumstances as an assurance of future good conduct. If an order to bind over the accused here is not appropriate either under section 173A or section 294 of the Criminal Procedure Code what is then the proper sentence to be passed on him? Lawton L.J. in *Re James Henry Sargeant*[8] at page 77 referred to the classical principles of sentencing, namely, retribution, deterrence, prevention and rehabilitation, and said that the court ought always to have these four classical principles in mind and apply them to the facts of the case to see which of them has the greatest importance in the case. On retribution Lawton L.J. said:

"The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked; it is that society, through the courts, must show its abhorrence of particular types of crime and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion."

Considering the background of the accused in the instant case fining him would also be ineffective as also a long prison sentence would be inappropriate. Therefore it is my considered view that in this case a sentence of imprisonment of six months will be appropriate in the hope that "his memory of the clanging of prison gates" will keep him from this crime in the future. The sentence of the Special President is accordingly substituted.

Order accordingly.